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# Ahmadi bin Yahya v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-06B-13 OF 2007
RAUS SHARIF PCA, AZAHAR MOHAMED AND ANANTHAM KASINATHER JJCA
31 JULY 2012

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*Civil Procedure — Jurisdiction — Court of Appeal — Power to review its earlier decision — Whether Court of Appeal's inherent jurisdiction to review ought to be exercised in present case*

D

*Civil Procedure — Res judicata — Abuse of court*

The applicant was charged in the sessions court for an offence of corruptly accepting gratification under s 11(a) of the Anti-Corruption Act 1997. The sessions court convicted and sentenced the applicant to 14 days imprisonment and to a fine of RM10,000. On appeal to the High Court the conviction and sentence was set aside. The Court of Appeal however allowed the public prosecutor's appeal ('the PP's appeal'), and restored the conviction and sentence recorded by the sessions court. This was an application by the applicant for this court to exercise its power of review to review and set aside its earlier decision, on the grounds that the applicant's cautioned statement, which was exculpatory in nature, had not received sufficient attention from the Court of Appeal. Before this court, the applicant submitted that because the High Court judge failed to mention the cautioned statement in his judgment, the Court of Appeal hearing the PP's appeal had been deprived of the High Court judge's view of the cautioned statement.

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**Held**, dismissing the application:

(1) (per **Raus Sharif PCA**) In the present application the applicant was in effect asking this court to reopen or review the evidence which had already been heard and finally determined by this court. In other words a review application was turned into an appeal, which was the very thing an apex court should avoid doing. In a review application it was not the duty of the court to re-examine the final verdict reached by the previous panel with a view of coming to a different conclusion. Thus, the present application should fail because there were no valid reasons for this court to review its own decision (see paras 9–10).

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(2) (per **Azahar Mohamed JCA**) Although in the present case the Court of Appeal was the final or apex court, it was clear on principle and on

authority that in very limited and exceptional circumstances, the Court of Appeal had the inherent jurisdiction to review, and if the circumstances so warrant, to set aside an earlier decision. However, such an exercise ought to be undertaken sparingly and with circumspection (see para 24).

(3) (per **Azahar Mohamed JCA**) The instant application did not fall within the very limited grounds and very exceptional circumstances in which a review may be made by this court of its own decision. This was because the present application was in actual fact an attempt to re-litigate the substantive merits of the appeal and re-open and re-examine a final decision that had already been reached by this court in the PP's appeal. The point involving the cautioned statement had already been argued before this court in the PP's appeal and the decision reached by the Court of Appeal had taken into consideration this point. As such, the judicial process had come to an end when the Court of Appeal had delivered its decision and the court became functus officio in so far as this matter was concerned. Since it had not been established by the applicant that there was injustice or procedural fairness on the face of the record, the present application was incompetent and untenable (see paras 40–41).

(4) (per **Azahar Mohamed JCA**) Further, by the doctrine of res judicata, once the appeal was heard and a decision given, the appeal could not be reheard, since the decision was final and became the truth between the parties. The principle of res judicata was based on the necessity of giving finality to judicial decisions (see para 40).

**[Bahasa Malaysia summary**

Pemohon dituduh di mahkamah sesyen kerana kesalahan menerima wang suapan secara rasuah di bawah s 11(a) Akta Pencegahan Rasuah 1997. Mahkamah sesyen menyabitkan dan menghukum perayu penjara 14 hari dan denda RM10,000. Atas rayuan ke Mahkamah Tinggi sabitan dan hukuman diketepikan. Mahkamah Rayuan walau bagaimanapun membenarkan rayuan pihak pendakwa raya ('rayuan PR'), dan mengembalikan sabitan dan hukuman yang direkodkan oleh mahkamah sesyen. Ini adalah permohonan oleh pemohon bagi mahkamah ini menjalankan kuasa menyemaknya untuk menyemak dan mengenepikan keputusan yang terdahulu, atas alasan bahawa pernyataan beramaran pemohon, yang mana adalah bersifat membersihkan nama, tidak menerima perhatian secukupnya daripada Mahkamah Rayuan. Di hadapan mahkamah ini, pemohon berhujah bahawa oleh kerana hakim Mahkamah Tinggi gagal untuk menyatakan pernyataan beramaran tersebut di dalam penghakimannya, Mahkamah Rayuan dalam mendengar rayuan PR telah dinafikan dengan pandangan hakim Mahkamah Tinggi mengenai pernyataan beramaran tersebut.

**Diputuskan**, menolak permohonan:

(1) (oleh **Raus Sharif PMR**) Dalam permohonan ini pemohon sebenarnya

A memohon mahkamah ini untuk mendengar semula atau menyemak semula keterangan yang mana telah didengar dan akhirnya ditentukan oleh mahkamah ini. Dalam perkataan lain permohonan semakan ditukar kepada rayuan, yang merupakan perkara yang mahkamah tertinggi patut mengelak daripada melakukannya. Dalam permohonan semakan ia B bukan tugas mahkamah untuk memeriksa semula keputusan muktamad yang dicapai oleh panel sebelumnya dengan berpandangan untuk mencapai kesimpulan yang berbeza. Oleh itu, permohonan ini patut gagal kerana tidak terdapat alasan yang sah untuk mahkamah ini menyemak semula keputusannya sendiri (lihat perenggan 9–10).

C (2) (oleh **Azahar Mohamed HMR**) Walaupun di dalam kes ini Mahkamah Rayuan adalah mahkamah terakhir atau tertinggi, adalah jelas atas prinsip dan atas autoriti bahawa dalam keadaan yang terhad atau luar biasa, Mahkamah Rayuan mempunyai bidang kuasa inherens untuk D menyemak semula, dan jika keadaan benar-benar mewajarkan, untuk mengetepikan keputusan terdahulu. Walau bagaimanapun pelaksanaan sedemikian patut dilaksanakan secara berhati-hati dan dengan berjaga-jaga (lihat perenggan 24).

E (3) (oleh **Azahar Mohamed HMR**) Permohonan ini tidak terangkum dalam alasan-alasan keadaan terhad dan luar biasa yang mana semakan boleh dibuat oleh mahkamah ini terhadap keputusannya sendiri. Ini adalah kerana permohonan ini sebenarnya percubaan untuk melitigasi semula merit substantif rayuan dan membuka semula dan menyemak semula keputusan muktamad yang telah dicapai oleh mahkamah ini di dalam F rayuan PR. Poin melibatkan pernyataan beramaran telah dihujahkan di hadapan mahkamah ini di dalam rayuan PR dan keputusan yang dicapai oleh Mahkamah Rayuan telah mempertimbangkan poin ini. Oleh itu, proses kehakiman telah sampai pada peringkat akhir apabila Mahkamah Rayuan telah memberikan keputusannya dan mahkamah menjadi G *functus officio* setakat berkenaan perkara ini. Memandangkan ia tidak dibuktikan oleh pemohon bahawa terdapat ketidakadilan dan keadilan prosedur atas rekod, permohonan ini tidak berkompeten dan tidak dapat dipertahankan (lihat perenggan 40–41).

H (4) (oleh **Azahar Mohamed HMR**) Selanjutnya, mengikut doktrin res judicata, apabila sahaja rayuan didengar dan keputusan diberikan, rayuan tidak boleh didengar semula, memandangkan keputusan adalah muktamad dan menjadi yang betul di antara pihak-pihak. Prinsip res judicata adalah berdasarkan ke atas keperluan memberi kemuktamadan I kepada keputusan kehakiman (lihat perenggan 40).]

**Notes**

For cases on abuse of court, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 6675–6676.

For cases on Court of Appeal, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4864–4869.

**Cases referred to**

*Adorna Properties Sdn Bhd v Kobchai Sosothikul* [2006] 1 MLJ 417; [2005] 1 AMR 501, FC (refd)

*Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd, & Another application* [2005] 3 MLJ 1; [2004] 5 AMR 709, FC (refd)

*Amalan Tepat Sdn Bhd v Panflex Sdn Bhd* [2012] 2 MLJ 168, FC (refd)

*Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1, FC (folld)

*Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)

*Badan Peguam Negara v Kerajaan Malaysia* [2009] 2 MLJ 161; [2009] 1 CLJ 833, FC (refd)

*Chan Yock Cher @ Chan Yock Kher v Chan Teong Peng* [2005] 1 MLJ 101; [2005] 4 AMR 693; [2005] 4 CLJ 29, FC (refd)

*Chemfert Sdn Bhd & Anor v Lim Hua* [2010] 5 MLJ 228; [2010] 7 CLJ 491, CA (refd)

*Chia Yan Teck & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1; [2001] 4 AMR 3921, FC (refd)

*Gurbachan Singh s/o Bagawan Singh & Anor v Vellasamy s/o Pennusamy & Ors and other applications* [2012] 2 MLJ 149; [2012] 2 CLJ 663, FC (refd)

*Harcharan Singh a/l Piara Singh v PP* [2011] 6 MLJ 145; [2011] 6 CLJ 625, FC (refd)

*Joceline Tan Poh Choo & Ors v V Munusamy* [2007] 6 MLJ 485; [2007] 5 AMR 725, FC (refd)

*Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385; [2002] 1 CLJ 645, FC (refd)

*MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673; [2002] 3 AMR 2917, FC (refd)

*Munawar Ahmad Anees v PP* [2010] 3 MLJ 285; [2010] 1 CLJ 802, FC (refd)

*PP v Abdullah bin Idris* [2009] 5 MLJ 192, CA (refd)

*PP v Ishak bin Hj Shaari* [2011] 3 MLJ 595, CA (refd)

*Raja Prithvi Chand v Sukhraj Raj* AIR 1941 FC 1, FC (refd)

*Ramanathan a/l Chelliah v PP* [2009] 6 MLJ 215, CA (refd)

*Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753; [2008] 5 CLJ 201, FC (refd)

*Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494, SC (refd)

*Taylor v Lawrence* [2002] 2 All ER 353, CA (refd)

*Uddin (a child), Re* [2005] 3 All ER 550, CA (refd)

**Legislation referred to**

Anti-Corruption Act 1997 ss 11(a), 16, 45(3)
Civil Law Act 1956 s 3(1)(a)
Courts of Judicature Act 1964 ss 38(1), 42, 44, 50, 50(1), 74, 87
Federal Constitution art 121, 121(1B), (2)
Penal Code s 376
Rules of the Court of Appeal 1994
Rules of the Federal Court 1995 r 137
Rules of the High Court 1980 O 92 r 4

*RSN Rayer (R Nethaji Rayer & Co) for the accused.*
*Saiful Hazmi bin Mohd Saad (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.*

**Raus Sharif PCA:**

**[1]** I have had the privilege of reading the judgment of my learned brother Azahar Mohamed JCA in draft and agree with the reasons in dismissing the applicant's application. However, I wish to express my own view on this matter.

**[2]** The applicant's application is for the Court of Appeal to review and set aside its own decision given on 13 December 2011 in Criminal Appeal No P-06B-13 of 2007. Thus, the preliminary issue that need to be decided is whether the Court of Appeal has the jurisdiction to review its own previous decision.

**[3]** It is not in dispute that the applicant's case originated from the sessions court. The case came before the High Court in its appellate capacity and not under its original jurisdiction. Thus, by virtue of s 87 of the Courts of Judicature Act 1964, the Court of Appeal is the final court for the applicant to seek redress. In other words, the applicant's case stops at the Court of Appeal. The applicant cannot bring his case further to the Federal Court (see *Munawar Ahmad Anees v Public Prosecutor* [2010] 3 MLJ 285; [2010] 1 CLJ 802). Thus, the question is, in such circumstances whether the Court of Appeal has the jurisdiction or powers to review its own previous decision.

**[4]** It is my view that when the Court of Appeal is the final court (apex court), it has the inherent jurisdiction or powers to review its own previous decision. No doubt that the Court of Appeal is not statutorily conferred with such jurisdiction or powers but as rightly pointed out by Mohd Hishamudin JCA in his dissenting judgment in *Public Prosecutor v Ishak bin Hj Shaari* [2011] 3 MLJ 595 that '… the source of the inherent powers is the judicial power that is vested on the judiciary by the Federal Constitution, in particular art 121'.

**[5]** An apex court must be armed with such inherent powers in order to correct obvious mistake and to do justice. However, in exercising such powers, it should not position itself as if it were hearing an appeal. A good guide of such exercise of powers by an apex court has been laid down by the Federal Court in the case of *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1 at p 7. The case clearly demonstrates that the power by an apex court to review its own previous decision may only be done in very exceptional circumstances.

**[6]** In *Gurbachan Singh s/o Bagwan Singh & Anor v Vellasamy s/o Pennusamy & Ors and other applications* [2012] 2 MLJ 149 at p 149; [2012] 2 CLJ 663 at p 663, I have, speaking for the Federal Court indicated that one instance where the power to review may be exercised is when there is a corum failure. Another instance that I can think of is where the Court of Appeal has by mistake imposed a wrong sentence as provided by law. Example, if the law imposes a maximum sentence of 20 years imprisonment, but for a mistake the sessions court imposes 25 years imprisonment; and, this is subsequently affirmed by the High Court and Court of Appeal. In such a situation, another panel of the Court of Appeal, being the apex court can use its inherent powers to set aside the illegal sentence and impose the sentence that is appropriate as provided by the law. Of course there may be other instances but the exercise of such power depends on the facts and circumstances of each case (see *Ramanathan a/l Chelliah v Public Prosecutor* [2009] 6 MLJ 215). However, as said earlier, the power to review must not be treated as an appeal; otherwise, there will be no end to litigation.

**[7]** Thus, in the present case, the applicant's reason for a review is that 'D18' being the cautioned statement of the applicant which was tendered into court as evidence was not mention by the trial judge in the grounds of judgment. What had happened in this case was this: the applicant was charged in the Sessions Court Penang for an offence under s 11(a) of the Anti-Corruption Act 1997, punishable under s 16 of the same Act. The applicant was convicted for the said charge and was sentenced to 14 days imprisonment and a fine of RM10,000 in default one year imprisonment. Dissatisfied with the decision, the applicant appealed to the High Court. The learned High Court judge allowed the appeal and set aside the conviction and sentence. The Public Prosecutor in turn appealed to the Court of Appeal against the decision of the High Court. On the 13 November 2011 the Court of Appeal set aside the order for acquittal by the High Court and maintained the conviction and sentence imposed by the sessions court.

**[8]** Before us, the applicant contended that since the High Court judge had failed to mention in his judgement the cautioned statement of the applicant, the Court of Appeal in allowing the appeal by the public prosecutor was

deprived of the view of the High Court judge on the purported cautioned statement. To the applicant, the cautioned statement is a very important piece of evidence which support's the applicant's case and any failure to consider the cautioned statement had occasioned a serious miscarriage of justice.

**[9]** With respect, the applicant in effect is asking this court to reopen or review the evidence which has already been heard and finally determined by this court. This is the very thing, an apex court should avoid while hearing a review application. A review application must not be turned into an appeal. In a review application, it is not the duty of this court to go behind or to examine the final verdict reached by a previous panel with a view of coming to a different conclusion. Permitting parties to treat a review application as though it is an appeal is clearly an abuse of the process of law.

**[10]** Thus, on the facts of this case there are no valid reasons for this court to review its decision given on 13 December 2011. The application must fail.

**Azahar Mohamed JCA:**

**[11]** This is an application by Ahmadi bin Yahya (the applicant) by way of a notice of motion dated 6 January 2012 in encl 25a for this court to review and to set aside its own decision given on 13 December 2011 in Criminal Appeal No P-06B-13 of 2007.

**[12]** The relevant antecedent facts giving rise to this application are these. The applicant was originally charged in the Sessions Court at Georgetown for an offence of corruptly accepting gratification under s 11(a) of the Anti-Corruption Act 1997 punishable under s 16 of the same Act. On 1 March 2007, after a full trial, the sessions court convicted the applicant on the said offence and had accordingly sentenced him to 14 days imprisonment and to a fine of RM10,000 in default 1 year imprisonment. He was also ordered by the sessions court to pay a penalty of RM1,000. He then appealed to High Court against the decision. On 1 November 2007, the High Court allowed his appeal. Consequently, the High Court quashed the conviction and sentence. The public prosecutor being dissatisfied with the decision of the High Court appealed to the Court of Appeal. This court heard the appeal on 13 December 2011 wherein at its conclusion this court unanimously allowed it. This court then set aside the order of the High Court and restored the conviction and sentence recorded by the sessions court. Subsequently, as I have indicated earlier, by the notice of motion herein the applicant applies to this court to review the said decision.

**[13]** Against the backdrop of the above, two important points should now be

highlighted here. First, a panel of three judges of the Court of Appeal heard and disposed of the applicant's appeal on 13 December 2011 in accordance with s 38(1) of the Courts of Judicature Act 1964 ('CJA'), which provides that every proceeding in the Court pf Appeal shall be heard and disposed of by three judges or such greater uneven number of judges as the President of Court of Appeal may in any particular case determine. As a matter of fact, it is a usual and standard practice for the president to assign a panel of three judges to each appeal. In effect, the panel of the three judges heard and made the decision on the appeal for the entire Court of Appeal.

**[14]** Secondly, this matter had originated from a sessions court. In a criminal matter which originated from the sessions court, the Court of Appeal stands as the apex court. No further appeal shall lie to the Federal Court (see *Sia Cheng Soon & Anor v Tengku Ismail Tengku bin Ibrahim* [2008] 3 MLJ 753; [2008] 5 CLJ 201). In *Munawar Ahmad Anees v Public Prosecutor* [2010] 3 MLJ 285; [2010] 1 CLJ 802), Raus Sharif FCJ (as His Lordship then was) said:

> In the present case, it is not in dispute that the applicant's case originated from the sessions court. The matter came before the High Court in its appellate capacity and not under its original jurisdiction. Section 87 of the Courts of Judicature Act 1964 provides that the Federal Court shall have jurisdiction to hear and determine any appeal from the decision of the Court of Appeal in its appellate jurisdiction in respect of any matter decided in the High Court in its original jurisdiction. In a criminal matter which originated from the sessions court, as in this case, the Court of Appeal stands as the apex court. No further appeal shall lie to the Federal Court. The appeal should stop at the Court of Appeal.

**[15]** In this regard, art 121 of the Federal Constitution provides:

> (1B) There shall be a court which shall be known as the Mahkamah Rayuan (Court of Appeal) and shall have its principal registry at such place as the Yang di-Pertuan Agong may determine, and the Court of Appeal shall have the following jurisdiction, that is to say:
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> (a) jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the Court and appealable under federal law to a judge of the Court); and
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> (b) such other jurisdiction as may be conferred by or under federal law.

**[16]** Even more to the point is s 50(1) of the CJA, which provides the appellate jurisdiction of the Court of Appeal as follows:

> Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court —
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> (a) in the exercise of its on original jurisdiction; and
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> (b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.

**[17]** Under that scheme of the provision, it is patently clear that the Court of Appeal is not statutorily conferred with any appellate or review jurisdiction to re-hear and decide an appeal on which judgment had previously been rendered by the same court. The expression 'appeal' in s 50 of the CJA never contemplated the jurisdiction of the Court of Appeal to 're-hear' or 'review' an appeal on which judgment had been given. Bearing this consideration in mind and given that the Court of Appeal is the apex court on matters originating from the session court, one would have thought that the decision of this court on 13 December 2011 would bring this matter to an end.

**[18]** This then brings into focus the following primary question of law which is of public importance: whether the Court of Appeal, as an apex court, has the inherent jurisdiction to review its own previous decision in the same case.

**[19]** In connection with this issue, there are two previous judgments of the Court of Appeal that ruled to the effect that this court has the inherent power to review its own previous decision under very exceptional circumstances. First is the case of *Ramanathan a/l Chelliah v Public Prosecutor* [2009] 6 MLJ 215 where Gopal Sri Ram JCA (as His Lordship then was) in delivering the unanimous judgment of the court said:

> It is now settled that the Court of Appeal has jurisdiction to review its own decision in a given case. See *Taylor v Lawrence* [2002] EWCA Civ 90, where it was held as follows:
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> > The Court of Appeal had a residual jurisdiction to reopen an appeal which it had already determined in order to avoid real injustice in exceptional circumstances. The court had implicit powers to do that which was necessary to achieve the dual objectives of an appellate court, namely to correct wrong decisions so as to ensure justice between the litigants involved, and to ensure public confidence in the administration of justice, not only by remedying wrong decisions, but also by clarifying and developing the law and setting precedents. A court had to have such powers in order to enforce its rules of practice, suppress any abuses of its process and defeat any attempted thwarting of its processes. The residual jurisdiction to reopen appeals was linked to a discretion which enabled the Court of Appeal to confine its use to the cases in which it was appropriate for the jurisdiction to be exercised.
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> See also *Chu Tak Fai v Public Prosecutor* [2007] 1 MLJ 201; [2006] 4 CLJ 931.

> We are of the view that it is important to recognise that this court has a residual jurisdiction to reopen an appeal which it had already determined particularly in cases where there is no further recourse to a party. In a case as the present, since the accused was tried in a subordinate court, this court is the court of last resort. The jurisdiction to reopen and review is therefore important in a case as the present to ensure that a manifest injustice does not go by uncorrected.

**[20]** The second case is *Public Prosecutor v Abdullah bin Idris* [2009] 5 MLJ 192, where James Foong JCA (as His Lordship then was) in delivering the unanimous judgment of the court, concluded the following, after a careful and comprehensive analysis of case law authorities and the relevant statutory provisions:

> When a court is armed with 'residual jurisdiction' or 'implicit or implied jurisdiction' or 'inherent jurisdiction' for the 'the doing by the courts of acts which it needs must have power to do in order to maintain its character as a court of justice' then I am of the view that the Court of Appeal is seized with jurisdiction, not from O 92 r 4 of the Rules of the High Court but from a residual or implicit or implied form which naturally makes no distinction between civil and criminal cases. Such inherent power applies across the board save and except within the limited circumstances as forewarned by the authorities cited above.

**[21]** These two decisions were however not followed by the Court of Appeal in *Public Prosecutor v Ishak bin Hj Shaari* [2011] 3 MLJ 595. In this case, the respondent was charged in the sessions court with an offence of rape of a minor under s 376 of the Penal Code. The respondent was convicted and sentenced by the said court to 15 years imprisonment and five strokes of whipping. On appeal to the High Court, the conviction and sentence was set aside. The Court of Appeal however allowed the public prosecutor's appeal, and restored the conviction and sentence recorded by the sessions court. Subsequently, the respondent applied to the Court of Appeal to exercise its power of review to review the earlier decision of the Court of Appeal. The public prosecutor then raised a preliminary objection that the Court of Appeal has no jurisdiction or power to review its own previous decision. By a majority, the Court of Appeal in *Public Prosecutor v Ishak bin Hj Shaari* allowed the public prosecutor's preliminary objection. In delivering the majority judgment, Low Hop Bing JCA said that the jurisdiction of the Court of Appeal is to be determined by reference to art 121(1B) of the Federal Constitution read with s 50(1) of the CJA and O 92 r 4 of the Rules of the High Court 1980. In the words of His Lordship:

> The Court of Appeal does not have any criminal appellate jurisdiction to hear and determine criminal appeals which had finally been disposed of by the same court. Article 121(1B) and s 50(1) have never contemplated the existence of the inherent powers of the Court of Appeal in the exercise of criminal appellate jurisdiction.

His Lordship then continued:

> The absence of the word 'review' in art 121(1B), s 50(1) and O 92 r 4 means that no review jurisdiction has ever been conferred upon the Court of Appeal when it was created in 1994.

**[22]** Zaharah JCA in her separate concurring judgment said that the CJA sets out in detail the limits of the jurisdiction conferred on the Court of Appeal and that nothing in s 50 of the CJA or any other provisions of the said Act or any other law confers upon the Court of Appeal the jurisdiction to review any matter which it has heard and finally determined, except in the circumstances set out in ss 42 and 44. Her Ladyship added:

> … it is my view that the reopening, rehearing, re-examination or review of a matter which has already been finally determined by a court is not merely a procedural issue but is a substantive one. It is therefore a matter of jurisdiction. Unless and until jurisdiction is granted by law, this court has no such jurisdiction.
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> As such jurisdiction has not been granted by the Federal Constitution or by or under any federal law, or by the common law as it is applicable in this country; this court has no jurisdiction to hear this application.

**[23]** In his dissenting judgment, Mohd Hishamuddin JCA said:

> … I am of the view that the Federal Court and the Court of Appeal have the inherent jurisdiction or powers to review their own previous decisions in exceptional circumstances where the court is satisfied that it is necessary to do so in order to prevent an injustice being occasioned by the previous decision or to prevent an abuse of the process of the court, particularly when that previous decision was made by the Court of Appeal sitting as a court of last resort.
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> … The source of the inherent powers is the judicial power that is vested on the judiciary by the Federal Constitution, in particular, art 121.

**[24]** After giving my utmost and anxious consideration to this issue, with the greatest of respect, I find myself in agreement with the judgments of this court in *Ramanathan a/l Chelliah v Public Prosecutor*, *Public Prosecutor v Abdullah bin Idris* and the minority judgment in *Public Prosecutor v Ishak bin Hj Shaari*. In my view, it is clear on principle and on authority that in very limited and exceptional circumstances, in order to uphold the Court of Appeal as a court of justice and to meet the ends of justice, it must have an inherent jurisdiction and the necessary inherent power to prevent injustice and to ensure public confidence in the administration of justice. In a case where there is no alternative effective remedy, as an apex court, the Court of Appeal has an inherent jurisdiction to review, and if the circumstances so warrant, to set aside an earlier decision made for instance, in clear violation or breach of statutory

law. Courts of justice have no authority to act in contravention of written law. For that reason, the ends of justice will not be met if such inherent jurisdiction and inherent power do not exist. But such an exercise must only be undertaken sparingly and with circumspection. It is important that this court makes use of it with a proper sense of responsibility and wisely to remove any injustice. I now give my reasons for so deciding.

**[25]** To start with, I am guided by the case of *Megat Najmuddin Dato Seri (Dr) Megat Khas v Bank Bumiputra Malaysia Bhd* [2002] 1 MLJ 385; [2002] 1 CLJ 645 where the Federal Court considered art 121(2) of the Federal Constitution in relation to inherent powers of the court as the apex court. Steve Shim CJ (Sabah & Sarawak) in his judgment said:

> Where there is a clear case of injustice being committed, the Federal Court, as an apex court in the land, cannot stand idly by and do nothing. It cannot and should not shirk from its responsibility of preventing injustice in appropriate cases. It must deal with it. In this regard, the Federal Court has been conferred with inherent powers under r 137 of the Federal Court Rules 1995. This has been reiterated very recently by the Federal Court in *Chia Yan Teck & Anor v Ng Swee Keat & Anor* [2001] 4 CLJ 61 when Mohd Dzaiddin KHN said, inter alia:
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> > Rule 137 of the Rules clearly gives us the inherent power to hear any application or make any order as may be necessary to prevent injustice.
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> In addition, I take the view that the Federal Court also has the inherent jurisdiction under the common law to deal with cases with a view to preventing injustices in limited circumstances. This is clearly in line with s 3(1)(a) of the Civil Law Act 1956, which was promulgated in accordance with cl (c) of art 121(2) Federal Constitution which confers on the Federal Court 'such other jurisdiction as may be conferred by or under federal law'.

**[26]** The next case which I think has a very strong bearing on the issue is *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1. Zaki Tun Azmi PCA (as His Lordship then was) in explaining the meaning of 'inherent powers' and 'inherent jurisdiction' said:

> What then is the meaning of inherent jurisdiction? According to the *Concise Oxford Dictionary*, 'inherent' means 'existing in something esp as a permanent or characteristic attribute'. In the context of law, that inherent jurisdiction is deemed to be part of the court's power to do all things reasonably necessary to ensure fair administration of justice within its jurisdiction, subject to valid existing laws including the Constitution. In other words, that inherent power is found within the very nature of a court of law, unlike power conferred by statute.
>
> The *Halsbury's Laws of England,* (4th Ed), in Vol 37 at para 12 refer to 'inherent jurisdiction' as follows:

> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them.

In *Bremer Vulkan v South India Shipping* [1981] 1 All ER 289 295, Lord Diplock speaking on the subject of dismissing a pending action for want of prosecution said:

> The power to dismiss a pending action for want of prosecution in cases where to allow the action to continue would involve a substantial risk that justice could not be done is thus properly described as an 'inherent power' the exercise of which is within the 'inherent jurisdiction' of the High Court. It would I think be conducive to legal clarity if the use of these two expressions confined to the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice. (Emphasis added.)

**[27]** In the same case, the limit of such jurisdiction was explained by Abdul Hamid Mohamed CJ in the following words:

> In an application for a review by this court of its own decision the court must be satisfied that it is a case that falls within the limited grounds and very exceptional circumstances in which a review may be made. Only if it does, that the court reviews its own earlier judgment. Under no circumstances should the court position itself as if it were hearing an appeal and decide the case as such. In other words, it is not for the court to consider this court had or had not made a correct decision on the facts. That is a matter of opinion. Even on the issue of law, it is not for this court to determine whether this court had earlier, in the same case, interpreted or applied the law correctly or not. That too is a matter of opinion. An occasion that I can think of where this court may review its own judgment in the same case on question of law is where the court had applied a statutory provision that has been repealed. I do not think that review power should be exercised even where the earlier panel had followed certain judgments and not the others or had overlooked the others. Not even where the earlier panel had disagreed with the court's earlier judgments. If a party is dissatisfied with a judgment of this court that does not follow the court's own earlier judgments, the matter may be taken up in another appeal in a similar case. That is what is usually called 'revisiting'. Certainly, it should not be taken up in the same case by way of a review. That had been the practice of this court all these years and it should remain so. Otherwise, there will no end to litigation. A review may lead to another review and a further review.

**[28]** In my view, the case of *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* is sufficient authority to establish the principle that inherent jurisdiction of the Court of Appeal, when acting as the apex court, exists independently of it being conferred by any written law. Where the previous decision of this court could be clearly shown to be null and

void by reasons of illegality and/or lack of jurisdiction, this very court has an inherent jurisdiction to review, and if the circumstances so warrant, the power to set aside the decision.

**[29]** In his illuminating article entitled 'The Inherent Jurisdiction of the Court' 1970 Current Legal Problems 23, Sir Jack Jacob explained the juridical basis of inherent jurisdiction of court as follows:

> … the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called 'inherent'. This description has been criticized as being 'metaphysical', but I think nevertheless that it is apt to describe the quality of this jurisdiction. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfill itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner.

**[30]** It is quite important to note that in *Harcharan Singh a/l Piara Singh v Public Prosecutor* [2011] 6 MLJ 145; [2011] 6 CLJ 625, the Federal Court reiterated that as an apex court it has residual jurisdiction to re-hear and re-open its own earlier decision in a fit and proper case to prevent injustice or to prevent an abuse of the process of the court. This is a significant case because a five member panel of the Federal Court has expressly said that where the Court of Appeal is the apex court of any particular case in view of s 87 of the CJA then it is also clothed with such inherent power. In the words of Richard Malanjum CJ (Sabah & Sarawak):

> A court of final instance must be equipped with residual jurisdiction to rehear and reopen its own earlier decision in a fit and proper case (see *Taylor v Lawrence* [2002] 2 All ER 353, and *Re Uddin* [2005] 3 All ER 550). But the rule does not create or provide additional power or new jurisdiction to this court (see *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1). Such must be the legal position as there should be finality in any decision of this court (see *Allied Capital Sdn Bhd v Mohd Latiff Shah Mohd & Another Application* [2005] 3 MLJ 417; [2004] 4 CLJ 350; *Adorna Properties Sdn Bhd v Kobchai Sosothikul* [2006] 1 MLJ 565; [2005] 1 CLJ 565; *Public Prosecutor v Denish Madhavan* [2010] 5 CLJ 635).
>
> Accordingly, where the Court of Appeal is the apex court of any particular case in view of s 87 of the Courts of Judicature Act 1964 ('CJA') then it is also clothed with such inherent power (see *Ramanathan Chelliah v Public Prosecutor* [2009] 6 CLJ 55). And if the High Court is similarly positioned, it too has the inherent power (see *Public Prosecutor v Abdullah Idris* [2009] 5 CLJ 445).

**[31]** These authorities were followed recently by the Federal Court in *Gurbachan Singh s/o Bagawan Singh & Anor v Vellasamy s/o Pennusamy & Ors and other applications* [2012] 2 MLJ 149; [2012] 2 CLJ 663, Raus Sharif PCA after reviewing and analysing those authorities said:

> Despite the long list of circumstances listed above, this court has always been strict in invoking its inherent powers to review its own decision. In fact, over the years there are not many instances where this court had exercised its inherent powers to review its own decision. For an application for leave to appeal, the only occasion where this court has exercised its discretion in reviewing its own decision was in Allied Capital Sdn Bhd. Other than Allied Capital Sdn Bhd, this court had never overturned its own decision on refusal or granting the leave to appeal ordered by an earlier panel.

**[32]** Earlier in the judgment, His Lordship summarised the limited or exceptional circumstances in which the review power is available and maybe exercised by the court as follows:

(a) that there was a lack of coram, eg the court was not duly constituted as two of the three presiding judges had retired (*Chia Yan Teck & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1; [2001] 4 AMR 3921);

(b) the applicant had been denied the rights to have his appeal heard on merits by the appellate court (*Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385);

(c) where the decision had been obtained by fraud or suppression of material evidence (*MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673; [2002] 3 AMR 2917);

(d) where the court making the decision was not properly constituted, was illegal or lacking jurisdiction, but the lack of jurisdiction is not confined to the standing of the coram that rendered the impugned decision (*Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd & another application* [2005] 3 MLJ 1; [2004] 5 AMR 709);

(e) clear infringement of law (*Adorna Properties Sdn Bhd v Kobchai Sosothikul* [2006] 1 MLJ 417; [2005] 1 AMR 501);

(f) it does not apply where the findings of this court is questioned, whether in law or on the facts (since these are matters of opinion which this court may disagree with its earlier panel) (*Chan Yock Cher @ Chan Yock Kher v Chan Teong Peng* [2005] 1 MLJ 101; [2005] 4 AMR 693; [2005] 4 CLJ 29);

(g) where an applicant under r 137 has not been heard by this court and yet through no fault of his, an order was inadvertently made as if he had been heard (*Raja Prithvi Chand v Sukhraj Raj* AIR 1941 FC 1);

(h) Where bias had been established (*Taylor and Another v Lawrence* [2002] 2 All ER 353).

(i) where it is demonstrated that the integrity of its earlier decision had been critically undermined eg where the process had been corrupted and a wrong result might have been arrived at (*Re Uddin (a child)* [2005] 3 All ER 550); and

(j) where the Federal Court allows an appeal which should have been consequentially dismissed because it accepted the concurrent findings of the High Court and Court of Appeal (*Joceline Tan Poh Choo & Ors v V Munusamy* [2007] 6 MLJ 485; [2007] 5 AMR 725).

**[33]** For convenience, I shall refer to the cases which fall within the limited grounds and very exceptional circumstances as 'nullity' cases. In this regard, the factual matrix in the case of *Gurbachan Singh s/o Bagawan Singh v Vellasamy s/o Pennusamy* is instructive. In the review application, the Federal Court was concerned with the issue of coram failure. What had happened was that even though three judges had been empanelled to determine an earlier leave application, the chairman of the panel, rose and left the bench during submission of counsel for the applicants. The proceedings were not stood down as the remaining panel members continued hearing the matter in the absence of the chairman. His Lordship having referred to s 74 of the CJA made the following notable observation:

> It is our judgment that the moment the chairman rose and left the bench during the submission of counsel for the applicants, and the remaining panel members continued to hear the submissions, there was then no duly constituted court within the meaning of s 74 of the CJA. This is because part of the hearing had been conducted only by two judges. Section 74 of the CJA had been breached and the hearing became a nullity. This case falls within the limited grounds and very exceptional circumstances in which a review can be made.

**[34]** I pause here to refer to the very recent decision of the Federal Court case in *Amalan Tepat Sdn Bhd v Panflex Sdn Bhd* [2012] 2 MLJ 168. There, the Federal Court held that there was no provision either in the Federal Constitution or the CJA which conferred on this court the substantive power to review its own decision. The Federal Court held that upon taking the words of the Federal Constitution and the CJA in its natural and obvious sense it was found that the Federal Court was not at liberty to review, re-examine, reconsider or re-hear an appeal it had already heard and disposed of. With the greatest of respect, I observe that unlike the case of *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd*, the Federal Court in *Amalan Tepat Sdn Bhd v Panflex Sdn Bhd* did not touch upon the question that inherent jurisdiction or power of court exists independently of it being conferred by any written law. It seems to me that the Federal Court in that case

was more concerned with the interpretation and scope of application of r 137 of the Rules of the Federal Court 1995 ('RFC') and this is why it is in that particular context the decision of *Amalan Tepat Sdn Bhd v Panflex Sdn Bhd* must be understood and appreciated.

**[35]** Still, I need to consider one further point. It is imperative to point out that the Federal Court cases of *Megat Najmuddin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd*, *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd*, *Harcharan Singh a/l Piara Singh v Public Prosecutor* and *Gurbachan Singh s/o Bagawan Singh v Vellasamy s/o Pennusamy* are all cases concerning the application of r 137 of the RFC. I am mindful that the rules which govern the Court of Appeal are the Rules of the Court of Appeal 1994 ('RCA'). It is true that the RCA does not have a provision similar to r 137 of the RFC. Nevertheless, in my view, the pertinent principles which may be gathered from the abovementioned Federal Court judgments are applicable to the present case given that, as I have alluded to earlier in this judgment, inherent jurisdiction of the Court of Appeal exists within the limited grounds and very exceptional circumstances, independently of it being conferred by any written law. In an application for a review by this court of its own decision, the court must be satisfied that it is a case that falls within the limited grounds and very exceptional circumstance in which a review may be made as discussed by the various judgments of the Federal Court cited earlier. This high threshold prerequisite must be met before the inherent jurisdiction and power of this court may be exercised. Under no circumstances should the panel of this court which hears the review application place itself as if it were hearing an appeal and decide the case as such. It is not for the panel to consider whether the decision of the earlier panel had or had not made a proper decision on the facts since that is a matter of opinion. Furthermore, on the question of law, it is not for the review panel to resolve whether the earlier panel in the same case, interpreted or applied the law correctly or not for the reason that that too is a matter of opinion.

**[36]** Applying the same foregoing principles as laid down by the Federal Court to the present application, can it be said that the present application has passed the threshold for leave for review of the decision of 13 December 2011? The answer must lie first and foremost on the general grounds upon which the applicant has grounded his application. For this, it is necessary to take a closer look at the applicant's notice of motion, which reads:

> Bahawa keputusan Mahkamah Rayuan Malaya pada 13/12/2011 yang diputuskan oleh Yang Arif Dato Wira Low Hop Bing, Yang Arif Clement Skinner, Yang Arif Dato Malik Bin Haji Ishak yang mensabitkan dan menjatuhkan hukuman penjara 14 hari dan denda RM10,000 jika gagal membayar 1 tahun penjara ke atas perayu disemak semula dan diketepikan oleh panel hakim-hakim Mahkamah Rayuan yang lain.

**[37]** As it can be understood from the supporting affidavit (encl 25b) which was affirmed by the applicant himself, the main thrust of the application is contained in paras 5–9 of the said affidavit which state:

> 5. Pihak Pendakwa telah pula merayu ke Mahkamah Rayuan Malaya di Putrajaya dan rayuan pendakwa telah didengar pada 13.12.2011 oleh 3 panel hakim-hakim Mahkamah Rayuan yang dipengerusikan oleh Yang Arif Dato Wira Low Hop Bing, Yang Arif Clement Skinner dan Yang Arif Dato Haji Abdul Malik Bin Haji Ishak di mana setelah mendengar hujahan-hujahan dua belah pihak, rayuan pendakwa raya dibenarkan dan sabitan dan hukuman Mahkamah Sesyen Georgetown Pulau Pinang ke atas saya dikekalkan.
>
> 6. Saya mengeksihibitkan di sini sesalinan keseluruhan rekod rayuan yang mengesahkan perkara-perkara tersebut di atas sebagai ekshibit AY-1.
>
> 7. Saya ingin menegaskan di sini bahawa dalam mencapai keputusan, panel-panel hakim Mahkamah Rayuan yang mendengar rayuan pada 13.12.2011 membuat keputusan dalam ketiadaan pandangan Mahkamah Tinggi atas perkara-perkara yang telah dihujah di hadapan Hakim Mahkamah Tinggi.
>
> 8. Saya juga dinasihati oleh peguam saya dan saya dengan sesungguhnya percaya bahawa dalam suatu perkara yang begitu penting seperti pertimbangan Percakapan Amaran iaitu D18, Mahkamah ihi akan berada dalam, keadaan yang merugikan tanpa manfaat pandangan Mahkamah Rayuan perantaraan iaitu dalam kes ini Mahkamah Tinggi Malaya di Pulau Pinang.

**[38]** When the application came before us, Mr Rayer learned counsel for the applicant drew our attention to exh D18 (p 172 of the appeal record), which is the statement of the applicant made under s 45(3) of the Anti Corruption Act 1997. In substance, he complained that exhibit D18, which is exculpatory in nature, had not received any or any sufficient attention from the Court of Appeal when the appeal was heard on 13 December 2011.

**[39]** There are two things to be said about the present application. In the first place, the decision of the Court of Appeal given on 13 December 2012 was made after all the parties had presented their submissions. In other words, the applicant had been accorded the right to be heard. Secondly, a plain reading of the notice of motion and the supporting affidavit would point to this: the appellant is unhappy and dissatisfied with the decision of this court given on 13 December 2011 and is seeking this court to re-open and re-examine the substantive merits of his appeal.

**[40]** To my mind, I do not think the present application can be anything but an attempt to advance new arguments in support of the appeal. The present case must be distinguished from the 'nullity' cases which I have discussed earlier. The instant application is in actual fact an attempt to re-litigate the substantive merits of the appeal and re-open and re-examine a final decision

that had already been given by this court on 13 December 2011. It seems to me that the applicant was attempting to have the proverbial second bite of the cherry in filing the application herein. In fact, in the course of the proceedings before us Mr Rayer fairly and frankly admitted that he had advanced his arguments concerning exh D18 during the hearing of the appeal on 13 December 2011. The point involving exh D18 had already been argued before this court on appeal on which a decision had already been delivered. For that reason, the merit of the appeal had been decisively settled by this court. Consequently, as argued by Encik Saiful Hazmi bin Mohd Saad, learned deputy public prosecutor, this appeal came to an end after this court had given its decision on 13 December 2011 and as a result, this court's jurisdiction on the appeal ended and concluded at that stage. There was no injustice or procedural unfairness on the face of the record (see *Badan Peguam Negara v Kerajaan Malaysia* [2009] 2 MLJ 161; [2009] 1 CLJ 833). In view of that, the court became functus officio in so far as the matter is concerned. The entire case has been disposed off, culminating with the decision of this court on 13 December 2011. The judicial process has come to an end. There is no longer any 'live' issue to be determined. Furthermore, by the doctrine of res judicata, once the appeal was heard and decision given, and there being no provision for a further appeal to the Federal Court on the matter, the appeal cannot be reheard, since the decision is final and becomes the truth between parties (see *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [2009] 3 MLJ 189; [1995] 3 CLJ 783). Res judicata is not confined to the issues which the court is actually asked to decide, but covers issue or facts which are clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them (see *Chemfert Sdn Bhd & Anor v Lim Hua* [2010] 5 MLJ 228; [2010] 7 CLJ 491). The applicability of the doctrine of res judicata in criminal matters is set out in *Superintendent of Pudu Prison & Others v Sim Kie Chon* [1986] 1 MLJ 494). The principle of res judicata is based on the necessity of giving finality to judicial decisions. It would not promote the due administration of the law or the promotion of justice for this court to have a power to re-hear an appeal afresh of which it has finally disposed. It is in the public interest that there should be finality in an appeal before this court. It is imperative to the due administration of our system of justice that once an appeal has been properly concluded, it is no longer before the court; if not there can be no end to litigation. It would otherwise open the floodgate to endless re-litigation before the same court. The value and usefulness of a decision of this court becomes doubtful and uncertain if the appeal can be reopened at any time and the court is permitted to make a different order.

**[41]** Having regard to the true nature of the present application, it is my judgment that the applicant has not satisfied the threshold required for review on the ground that it does not fall within the limited grounds and very exceptional circumstances in which a review may be made by this court. It has

not been established by the applicant that there was injustice or procedural unfairness on the face of the record. It is an incompetent and untenable application. As a result, it must be dismissed, and so I hold.

**[42]** My learned brother Anantham Kasinather JCA has read the draft of this judgment and has expressed his agreement with it.

*Application dismissed.*

Reported by Kohila Nesan